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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|--------------------------|---------------------|------------------|
| 09/982,004 | 10/18/2001 | Jacqueline Conrad Heisey | 8305M | 7478 |

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EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 12/05/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | | |
|------------------------------|--------------------------------------|---|--|
| Office Action Summary | Application No. 09/982,004 | Applicant(s) CONRAD HEISEY ET AL. | |
| | Examiner Lien T Tran | Art Unit 1761 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 November 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9 is/are pending in the application.
- 4a) Of the above claim(s) 4-7 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3, 8 and 9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

Applicant's election with traverse of Group I claims 1-3, 8-9 in Paper the response filed Nov. 3, 2003 is acknowledged. The traversal is on the ground(s) that the claims of both groups are closely interrelated from a patentability assessment standpoint and have not required a separate status in the art. This is not found to be persuasive because it is not clear what applicant mean by from a patentability assessment standpoint. The filling and the product in group I does not require the processing steps of the invention in group II. Thus, the two groups directed to different inventions and have different determination of patentability. The finding of a reference which makes the invention of group I obvious or anticipated might not be so for the invention of group II. The finding of prior art for the two groups is totally separate. The inventions do not need to be in separate status in the art to be restricted.

The requirement is still deemed proper and is therefore made FINAL.

The inclusion of claims 8-9 in Group II is a typographical error because claims 8-9 are already included in Group I. Group II only includes claims 4-7.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-2 and 8-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Keller et al (4880653) in view of Wong et (5667838).

Keller et al discloses a baked filled snack product. The product comprises a filling surrounded by a layer of dough. The dough comprises 19-25% water, 70-85% flour, 9-15% corn syrup, .5-1.5% salt as flavoring, 1-2.5% monoglyceride, 1-4% oil or fat, 1.5-2.5% malt and 1.5-2.5 % yeast. An edible material, preferably an edible creamy or paste material such as cheese paste, peanut butter etc is injected into the cavity of the dough. The tube of dough containing the filling is baked to obtain the baked filled snack product. (see column 3-5)

Keller et al do not disclose a filling having a viscosity of less than about 10,000cp and the thickness of the outer dough shell.

Wong et al disclose a nut spread having a viscosity of about 2000 centipoise or less. The nut spread has reduced stickiness and improved nut flavor. The spread is made out of composition containing nut and oil. (see col. 2 lines 46-52)

Keller et al disclose the filling can be peanut butter. Thus, it would have been obvious to one skilled in the art to use the nut spread taught by Wong et al to have a filling which has reduced stickiness and yet improved nut flavor. The language comprising of the claims do not exclude the other ingredients taught by Keller et al. It would also have been obvious to make the outer dough shell to have any desired degree of thickness depending on the texture wanted. A thicker shell will give a hardier

texture as opposed to thinner shell. The thickness selected would have been an obvious matter of choice.

Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Keller et al in view of Wong et al as applied to claims 1-2 and 8-9 above, and further in view of Shine.

Keller et al do not disclose adding protein.

Shine discloses a dough composition for pretzel in which protein such as whey protein concentrate, egg solids, wheat gluten (see example 1)

It would have been obvious to one skilled in the art to add protein to the dough of Keller et al to increase the protein content of the product and thereby making the product more nutritious. Shine shows that proteins can be added to pretzel dough without any adverse effect on the dough. The claim recites 0-5% corn syrup which means corn syrup can be excluded; the language comprising of the claim does not exclude the other ingredients disclosed by Keller et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Tuesday, Wednesday and Friday. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

November 26, 2003

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700